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# Lawyers and Alternative Dispute Resolution Success

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The Alternative Dispute Resolution (ADR) movement is often described as a loosely organized effort by community leaders and disputant-oriented professionals who are concerned about high and hidden costs of litigation, the inadequacy of judicial remedies, and the law's indifference to relationships. Opposed to domination by what they see as the materialistic and adversarial lawyer, ADR proponents emphasize the importance of informality, common interests, voluntary dispute resolving, and participation and control by parties rather than lawyers.[1]

The irony of the ADR movement is that for all its anti-lawyer bias, its legitimacy and eventual success will depend largely on whether lawyers will accept the new attitudes and use the new forums in their day-to-day practices. Rather than predict specific ADR developments for the 1990's, I want to identify the guidelines that the developments must satisfy to be legitimate and define the three principal areas in which progress might be made in the next decade.

ADR proponents want to restructure the balance among the dispute resolution processes in favor of a process which is more voluntary, informal, participatory, and comprehensive. They have built their movement in large part on strong opposition to the influence of lawyers. Yet they too often assume that litigation is the standard process for resolving disputes, with all other processes being alternatives. Recent studies suggest, however, that all methods of dispute resolution, from negotiation and mediation to arbitration and litigation, are complementary and to a large degree interdependent.[2] The voluntary methods of negotiation and mediation often succeed be-

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1. *See* Adler, *Is ADR a Social Movement?* 3 NEGOTIATION J. 59, 61-63 (1987).

2. *See, e.g.*, Kritzer, The Lawyer As Negotiator: Working in the Shadows 19-20 (Disputes Processing Research Program, Working Papers Series 7, Jan. 1986).

cause the more intrusive court system has already established a legal blueprint for a fair result in similar circumstances and is available as a forum of last resort to these parties. A proper view would take the "alternative" out of ADR.

Lawyers are America's professional dispute resolvers. Our culture sends people directly to lawyers first for help in resolving what those people regard as serious disputes or problems. Legal education trains lawyers to apply social criteria to resolve conflict. Lawyers then combine this acquired expertise with a monopoly of effective access to the judicial system. In addition, they are leaders in setting community standards through their activity in all phases of government, as officeholders, staff, and outside participants. More than any other single group, lawyers control the way Americans resolve disputes.

The processes that lawyers accept and use are the ones that are legitimate. Therefore, lawyers' standards for acceptance and use become a limit to the success of the ADR movement. The following qualities define what I think lawyers will demand as minimum conditions for a resolution process:[3]

(1) Accessible—available in a similar manner to all parties regardless of geographic location, economic or social status, or other demographic classification;

(2) Fair—nonarbitrary internal procedures that assure all parties, once in the process, a reasonable opportunity to participate successfully;

(3) Rational—participation by logical argument and proofs, rather than whim, power, or violence;

(4) Open—a recognized system for disclosing all relevant and nonprivileged information;

(5) Truthful—substantial grounds for confidence in the factual accuracy of what is being disclosed;

(6) Just—consistently produces substantive decisions that help the

3. Professor Maurice Rosenberg has suggested nine conditions that ADR mechanisms must satisfy to be accepted by lawyers. Edwards, *The Rising Work Load and Perceived "Bureaucracy" of the Federal Courts: A Causation-Based Approach to the Search for Appropriate Remedies*, 68 IOWA L. REV. 871, 924-25 (1983) (citing M. Rosenberg, The Adversary System and Dispute Processing in Our Society: Fine Tuning or Wholesale Revision 16-17 (unpublished draft prepared for National Conference on The Lawyer's Changing Role in Resolving Disputes, Harvard Law School, Oct. 14-16, 1982)). My list and Professor Rosenberg's have many elements in common, but the dissimilarities are noteworthy. I stress the need for open and truthful information, sharing, a just and progressive system, and the reality of lawyer dominance. Professor Rosenberg stresses impartiality, cost-effectiveness, insulation from manipulation, quickness consistent with deliberation, and retention of a human touch.

Judge Friendly also discussed similar elements in his description of a fair hearing in the administrative law context. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1268, 1279-95 (1975).

community run smoothly and are harmonious with fundamental political standards;

(7) Progressive—permits change in results over time to meet changing future needs; and

(8) Lawyer-dominant—provides a central role for lawyers.

Lawyers already use the courts, negotiation, and to some extent arbitration, plus controlled combinations of these three,[4] as acceptable processes for resolving client problems. Each process satisfies my eight standards in a way appropriate to the nature and seriousness of the problem. But ADR proponents call for more. They object to some lawyer standards, especially the need for lawyers as central players. Many recognize mediation, not negotiation and arbitration, as the fundamental ADR method. Mediation is voluntary, participatory, and party-controlling, but shares equal status with other criteria of fairness, such as personal morality, local friendships, or customs in the industry. Proponents embrace innovations such as the neighborhood mediation center, the mini-trial, and the ADR corporate pledge as valid expressions of the ADR movement.

Lawyers have not fully accepted either mediation or the new inventions as integral parts of a unified dispute resolution system. However, some recent trends suggest that the legal profession may be prepared to accept a more ADR-centered approach. The large number of new lawyers entering practice means greater diversity in the profession. More varied backgrounds, interests, and motivations erode blind acceptance of the traditional trial-advocate role and encourage more pluralism. Moreover, since the United States Supreme Court gave constitutional protection to attorney advertising in 1977,[5] law firms have become more sensitive to marketing their services to meet the needs of potential clients. Law practice has become more like a business that responds to consumer demand for quality service and less like a renaissance craft. Large urban law firms, considered the foundation of the legal establishment, are becoming business service conglomerates pressing at the frontier of traditional professionalism.[6]

I see three areas of progress for those who promote a more volun-

4. Examples of more or less acceptable hybrid processes include court-annexed arbitration, negotiated rulemaking, the settlement conference, and specific court procedures that encourage serious negotiation at an early date.

5. Bates v. State Bar of Arizona, 433 U.S. 350 (1977).

6. *See* Lewin, *Law Firms Expanding Scope*, N.Y. Times, Feb. 11, 1987, at 25, col. 3.

tary, community-oriented, and complementary system. First, lawyer attitudes, choices, and skills are lending broader support to ADR. Most law schools now teach courses in alternatives to litigation. Examples of such courses are: interviewing and counseling, negotiation, and mediation. States are requiring lawyers to participate in at least fifteen hours of continuing legal education annually; and law schools, state and local bar associations, the American Arbitration Association (AAA), the American Bar Asssociation Special Committee on Dispute Resolution, Center for Public Resources, and other groups, are offering materials and seminars that help practicing lawyers improve their ADR knowledge and skill. By the mid-1990's, these students and lawyers will have replaced the traditional paradigm, the trial advocate, with a DR (no A) role model.

Second, lawyers are presently creating and revising structures that meet my eight qualities of an acceptable legal standard. Examples include a revitalized settlement conference, summary jury trials, new forms of court-annexed arbitration and mediation, neighborhood dispute resolution centers, mandatory personal injury mediation policies by insurance companies, and workable procedures for mini-trials. The objective is to discover and institutionalize more effective patterns and forums for dispute resolution. Three groups share a special responsibility for progress in this area: the organized bar associations, the courts, and the legislatures. All three have the official mission, resources, organization, and power to plan changes carefully and implement new process structures that will attract attorney support.

A danger lies in the traditional lawyer's inclination to remake everything in the court's image—to robe mediators and codify informal procedures. As in other areas,[7] however, the final result will likely be less of a judicialization than a satisfactory adaptation of ADR to accommodate my eight qualities that make a process acceptable to lawyers.

Third, social attitudes are promoting a creative balance between individualism and materialism on the one hand, and relationships and community values on the other. Public demand is popularizing ADR among lawyers. Lawyers follow when clients ask them to reflect ADR values. Major corporations are demanding less costly, more business-oriented and less adversarial legal services, and law firms are responding with cost-effective innovations such as the mini-trial, negotiated rulemaking, and unique settlement devices like separate trust funds or buy-off agreements.[8] Lawyers and courts are respond-

7. *See* Friendly, *supra* note 3, at 1268. Although lawyers and judges initially demanded administrative hearing procedures and structure more nearly replicating the judicial system, courts have reversed this trend during the past two decades. *Id.* at 1279-95.

8. *See Skywalk Settlements*, ALTERNATIVES TO THE HIGH COST OF LITIGATION,

ing to the cries of both victims and defendants in mass disaster tort and other complex litigation areas through the use of video settlement packages, new class action methods, and multidistrict pretrial coordination. Because of citizen demand, legislatures are supplying the legal structure and funding for neighborhood and family dispute settlement centers. Market-driven forces, controlled by the paying public, are powerful stimulants for ADR concepts, but so far they have been the most visible in cases at the two extremes: national corporations with large business disputes, and local neighborhoods or families with private relationship problems. The vast middle range, involving lawyer activity in ordinary litigation, is largely undisturbed and remains the chief task for ADR in the next decade.

The 1980's have been a time for creative theorizing in ADR, multiple experiments in structure, new and continually fluctuating procedures, and growth among lawyers in awareness of ADR. Systematic empirical study, rigorous analysis of the resulting data, and careful implementation are the methods by which ADR will become integrated in our legal culture. Time and the natural forces in society are the motivating powers. The 1990's should see the legitimation of the best theories, ideas, and experiments of this decade.

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Sept. 1985, at 5-6 (for a discussion of the unique arrangements created by lawyers to settle claims arising from the Kansas City Hyatt Regency disaster of July 17, 1981).